

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

E.S.
N/D
144554

IN THE MATTER OF:)
)
Sauget Area 1, Site G) Civ. Action No.
Sauget, Illinois)
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)

**APPLICATION FOR WARRANT FOR ENTRY
AND INVESTIGATION PURSUANT TO THE
COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION AND LIABILITY ACT, 42 U.S.C. §§ 9601 et seq.**

The United States of America, on behalf of the United States Environmental Protection Agency (U.S. EPA) applies to this Court for a Warrant authorizing U.S. EPA officials and their assistants, contractors, and other authorized representatives, to enter upon a parcel of land located within a site known as Sauget Area 1, Site G, which is itself located at the southeast quadrant of the intersection of Mississippi and Queeny Avenues in the Village of Sauget, County of St. Clair, State of Illinois (See Exhibit 1 of Declaration of Samuel Borries). Site G is a vacant, fenced, partially covered industrial landfill. U.S. EPA wishes to enter Site G to: (a) implement a sampling program; (b) provide dust suppression measures; (c) consolidate, store, remove and/or treat contaminated substances; (d) close, as appropriate existing Site G monitoring wells; (e) provide cover on the site; and (f) institute necessary erosion control measures.

The United States submits this application, together with the supporting declaration of Mr. Samuel F. Borries, pursuant to the Comprehensive Environmental Response,

Compensation and Liability Act of 1980, as amended, commonly called "Superfund" or CERCLA, 42 U.S.C. §§ 9601 et seq., and alleges as follows:

STATUTORY AUTHORITY

1. U.S. EPA may enter upon a site to perform investigations, sampling and other response actions pursuant to the broad authority vested in the President of the United States by Sections 104(a), 104(b), and 104(e) of CERCLA, 42 U.S.C. §§ 9604(a), 9604(b), and 9604(e), and delegated to U.S. EPA pursuant to Executive Order No. 12316.

2. Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), authorizes U.S. EPA to take any response measure consistent with the National Contingency Plan, 40 C.F.R. Part 300, which is deemed necessary to protect the public health, welfare, or the environment, whenever:

- (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or
- (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare

3. Section 104(b) of CERCLA , 42 U.S.C. § 9604(b), grants U.S. EPA the authority to undertake the following response actions whenever it "has reason to believe that a release has occurred or is about to occur:"

[S]uch investigations, monitoring, surveys, testing, and other information gathering as [it] may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and

nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health, welfare, or the environment. In addition, [U.S. EPA] may undertake. . . studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions.

4. Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), defines a "release" as:

any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . .

5. Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1), provides that when there is "a reasonable basis to believe there may be a release or threat of release of hazardous substance," at a facility, U.S. EPA may, inter alia, gain entry to a facility "for the purposes of determining the need for response, or choosing or taking any response action under this subchapter, or otherwise enforcing the provisions of this subchapter" (emphasis added).

6. Once the "reasonable basis" standard of Section 104(e)(1) is satisfied, CERCLA Section 104(e)(3) authorizes U.S. EPA to "enter at reasonable times" the following types of sites:

- (A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.
- (B) Any vessel, facility, establishment, or other place from which or to which a hazardous substance

or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

42 U.S.C. § 9604 (e) (3). Furthermore, Section 104(e) (4) authorizes U.S. EPA to "inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any hazardous substance or pollutant or contaminant." 42 U.S.C. § 9604(e) (4).

7. In order to fulfill its statutory responsibility to protect human health and the environment, U.S. EPA selects sites where emergency or expedited action is necessary. These sites are selected on the basis of information gathered from federal, state, and local environmental regulatory activities and in some cases on information reported to U.S. EPA by private individuals.

8. The National Oil and Hazardous Substances Pollution Contingency Plan, codified at 40 C.F.R. Part 300, are the CERCLA implementing regulations, which were duly promulgated by U.S. EPA.

9. Sites where emergency or expedited action is necessary are defined under CERCLA and the National Contingency Plan (NCP).

U.S. EPA takes emergency or expedited action at sites where the following conditions exist:

- (1) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
- (2) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
- (3) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;
- (4) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;
- (5) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;
- (6) Threat of fire or explosion;
- (7) Other situations or factors that may pose threats to public health or welfare or the environment.

40 C.F.R. § 300.415.

10. U.S. EPA is authorized to gain access for the purposes of Section 104(e)(1) by a Warrant issued by a federal court. See, e.g., Koppers Industries, Inc. v. United States Environmental Protection Agency, 902 F.2d 756 (9th Cir. 1990) (affirming district court's denial of motion to quash Warrant issued under CERCLA Section 104(e), 42 U.S.C. § 9604(e)). See also, National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989) (upholding issuance of Warrant to U.S. EPA under the Resource Conservation and Recovery Act); Mobil Oil Corp. v. U.S. EPA, 716 F.2d 1187 (7th Cir. 1983), cert. denied, 466 U.S. 980 (1984) (upholding issuance of Warrant to U.S. EPA under the

Clean Water Act); Public Service Co. of Indiana v. U.S. EPA, 682 F.2d 626 (7th Cir. 1982), cert. denied, 459 U.S. 1127 (1983) (upholding issuance of Warrant to U.S. EPA under the Clean Air Act).

SAUGET AREA 1, SITE G

11. U.S. EPA has concluded that there may be a release or a threat of release of a hazardous substance, as defined by CERCLA Section 101(14), 42 U.S.C. § 9601(14), at Sauget Area 1, Site G, located in the southeast quadrant of the intersection of Mississippi and Queeny Avenues in Sauget, Illinois, including, but not limited to, release or threatened releases of the following hazardous substances: polychlorinated biphenols (PCBs) dioxin, endrin, naphthalene, pentachlorophenol, phenanthrene, 4-chloroaniline, 2,4,6-trichlorophenol, and n-nitro-sodiphenylamine. Sampling and inspections performed at Site G by U.S. EPA in May of 1994, as well as the fact that the site has caught fire on numerous occasions in 1994, provides a reasonable basis for these conclusions. (Declaration of Samuel Borries at paragraphs 9-11).

12. In order to protect the public health, welfare and the environment, and to avert the risk posed by following conditions present at Site G, U.S. EPA has determined that it is necessary to undertake emergency or expedited response actions at the site. (Borries Declaration at paragraph 17.) The conditions which necessitate emergency or expedited response actions at the facility are as follows: (1) actual or potential exposure to

nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants migrating off the site during wet weather events or via airborne dust, and (2) actual or potential combustion of hazardous substances or pollutants or contaminants on the site, which may cause a threat of release.

13. A title search prepared for Site G indicates that six parcels of property are included within the site. These parcels are owned, individually, by Cerro Copper Products Company, Wiese Engineering Company, Emily Hankins, Anthony Hankins, Moto Mart, Incorporated, and Queeny Properties, Incorporated.

14. U.S. EPA has obtained written consent to enter Site G and to conduct the activities noted in paragraph 18, below, from each of the individuals and corporations which own parcels of land within Site G noted in paragraph 13, above, with the exception of Ms. Emily Hankins.

15. Numerous attempts have been made by personnel of U.S. EPA to obtain Ms. Hankins' consent for access to the parcel of land she owns within Site G. (Ms. Hankins owns parcel A-4 within Site G, as identified in Exhibit 3 of the Declaration of Samuel Borries).

16. On March 27, 1995, Mr. Borries personally visited Ms. Hankins at her residence on 3110 Mississippi Avenue, Sauget, Illinois, to attempt to obtain her consent for access to her property on Site G to conduct the activities noted in paragraph

13, above. At that time, Ms. Hankins refused to give U.S. EPA consent to access to her property on Site G.

17. Despite U.S. EPA's diligent efforts to secure voluntary access, Ms. Hankins continues to refuse U.S. EPA's requests for consensual access to the parcel of land that she owns on the site. Thus, U.S. EPA is without an effective means to gain legal access to her portion of Site G, especially on an expedited basis, without the aid of this Court.

18. U.S. EPA seeks this Warrant to conduct the following actions:

- a. Implement a sampling and analytical program designed to identify contaminated material inside and outside of the Site G fenced area;
- b. Provide dust suppression measures for excavated contaminated material to insure contaminated dust does not migrate;
- c. Handle, consolidate, store, remove, and/or treat and dispose of contaminated liquids, soil, and sediment which has migrated off-site and/or still exists on Site G, including any contamination which may have migrated into the adjacent portion of Dead Creek;
- d. Consolidate and/or remove non-hazardous waste and/or brush and debris;
- e. Close/abandon any monitoring wells that interfere with placement of a landfill cover;
- f. Provide appropriate back-fill material as necessary to excavated areas and solidify/stabilize liquids, sludge and sediment as necessary to support overlying cover materials;
- g. Design and engineer any appropriate protective cover for the landfill contents and the consolidated materials placed in the fenced area of Site G complying with identified State or Federal Applicable or Relevant and Appropriate Requirements (ARARs); and

- h. Implement necessary erosion control measures to prevent cover erosion.

19. The site in question is vacant; thus, no individuals or business operations will be disrupted during U.S. EPA's operations on the site. U.S. EPA estimates that the activities for which this Warrant is requested will require on-site access for approximately one hundred and twenty (120) working days.

20. The above-described activities are consistent with the National Contingency Plan, 40 C.F.R. Part 300, which states:

For purposes of determining the need for response, or choosing or taking a response action, or otherwise enforcing the provisions of CERCLA, EPA . . . has the authority to enter any vessel, facility, establishment or other place, property or location described in paragraph (d)(2) of this section and conduct, complete operate and maintain any response actions authorized by CERCLA or these regulations.

40 C.F.R. § 300.400 (d).

21. The United States Supreme Court decisions in Camara v. Municipal Court, 387 U.S. 523 (1967) and Marshall v. Barlow's Inc., 437 U.S. 307 (1978), provide ample authority for this Court to issue a Warrant where a statute, such as CERCLA, confers a right to entry. See also, Mobil Oil Corp., 716 F.2d 1187; Bunker Hill v. U.S. EPA, 658 F.2d 1280 (9th Cir. 1981). Accord, Public Service Co. of Indiana v. U.S. EPA, 509 F. Supp. 720 (S.D. Ind. 1981). The standard for probable cause justifying the issuance of an administrative search Warrant, less rigorous than for a search and seizure Warrant in a criminal investigation, requires only a showing of either "specific evidence of an existing violation" or

"reasonable legislative or administrative standards" for conducting a particular inspection. Marshall, 436 U.S. at 320.

For purposes of an administrative search such as this, probable cause justifying the issuance of a Warrant may be based not only on specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.

Camara, 387 U.S. at 538.

22. U.S. EPA has established the reasonable basis required by CERCLA to justify entry and response action at the Sauget Area 1, Site G site, has shown reasonable legislative and administrative standards satisfying the requirements set forth in the Barlow and Camara decisions, and has therefore satisfied the requirements for issuance of the requested Warrant.

23. In this case, U.S. EPA has demonstrated that:

(1) U.S. EPA has reason to believe that there has been a release or a substantial threat of a release at the Sauget Area 1, Site G site (Borries Declaration at paragraphs 9-11); (2) response actions to stabilize the site are necessary and appropriate to protect human health and the environment (Borries Declaration at paragraph 17) and (3) that Ms. Hankins, a partial owner of the site, has refused to give consent to U.S. EPA and its officers, employees, representatives, contractors, and subcontractors to conduct these responses (Borries Declaration at paragraphs 15-16).

24. U.S. EPA estimates that the activities it proposes to undertake at Site G can be accomplished in approximately one

hundred and twenty working days, to take place beginning within thirty (30) days from the day the Warrant is granted. If additional response action, sampling or investigations are necessary, U.S. EPA will apply to this Court for an extension of the Warrant. An order is attached to this application.

Respectfully submitted,

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